A **BANK KERJASAMA RAKYAT MALAYSIA BHD**

v.

LEE KAM YOONG & ANOR;
ASEAMBANKERS (M) BHD & ORS (THIRD PARTIES)

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HIGH COURT MALAYA, KUALA LUMPUR
MOHD ZAWAWI SALLEH J
[SUIT NO: 22A-731-2011]
21 MAY 2012

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CIVIL PROCEDURE: *Third parties - Third party notice - Setting aside - Application for - Defendants suffered loss due to project funded by third party - Third party ordered to pay damages in separate suit - Plaintiff sued defendants for outstanding sum from a property sale* D *agreement - Defendants issued third party notice - Whether third parties liable for defendant's inability to pay plaintiff - Whether third party notice premature*

This was an application by the third parties to set aside the third E party notice ('third party notice') issued by the defendants pursuant to O. 16 r. 4 and/or r. 6 of the Rules of the High Court 1980. Briefly, the background facts showed that the defendants had been sued by the plaintiff for the outstanding selling price under a property sale agreement ('PSA') under Bai Bithaman Ajil Facility granted to them. The defendants, however, alleged that F their inability to pay the outstanding sum was due to the first named third party's ("Aseambankers (M) Sdn Bhd") breaches in contract, tort and as banker to Shencourt Sdn Bhd ('the company') in which the first defendant was a managing director, and to the project undertaken by the company ('the project'). The G relationship between the first defendant, the company and the third parties arose from a syndicated loan by Aseambankers with the participation of the second, third and fourth named parties to finance the project. By an action taken against Aseambankers by the company, which was heard together with a suit where the H company and the first defendant were sued by the third parties ('the civil suit'), the High Court held, *inter alia*, that the financial catastrophe suffered by the company was a direct consequence of the third parties' unreasonable and unlawful act of refusing the drawdown of the facilities for the company's benefit in the project. I The learned judge had then ordered Aseambankers to pay

damages for the loss suffered by the first defendant as a result of the sale of his movable and immovable properties to raise funds for the project. The defendants thus alleged that the third parties were liable to indemnify them for any payment ordered by the court. On that notice, the third party notice was filed and issued by the defendants against the third parties. Dissatisfied with the action taken, the third parties filed the present application.

Held (allowing third parties' application with costs):

(1) The third party notice can be set aside upon an application pursuant to O. 16 r. 6 of the Rules of High Court 1980 (RHC).However, the court is mindful of the principles which are well settled while exercising its power in determining the present application (*Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd*, refd) (paras 18 & 19)

(2) A distinction should be made between the plaintiff's claim herein and the one against the 1st third party in the civil suit. The claim against the defendants in this case arose from the breach on the part of the defendants to pay the outstanding selling price under PSA, while the one in the civil suit emerged from the breach of a syndicated loan by the 1st third party in respect of the project undertaken by Shencourt Sdn Bhd. (para 23)

(2a) Although in the civil suit the learned judge had clearly ordered Aseambankers (M) Bhd to pay the loss suffered by the 1st defendant as a result of the sale of his movable and immovable properties to raise funds for the project remaining due, there was no proof in this present case that the property in this case was subjected to the sale so ordered or that the state of vulnerability of the defendants to pay the plaintiff had been taken into consideration before such order was made. Therefore, this court was unable to see how the third party action was inextricably linked to an integral and inseparable part of the present action. (para 24)

(3) The third party notice, which was totally dependent on the judgment in the civil suit, was premature because it had been stayed pending an appeal to the Court of Appeal. On that premise, the defendant's objection to this application did not hold water (para 25 & 26)

A **Case(s) referred to:**
Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***
Barclays Bank v. Tom [1923] 1 KB 221 ***(refd)***
CIMB Bank Bhd v. Dresdner Kleinwort Ltd [2008] 4 SLR 543 ***(refd)***
B *Lee Kuan Yew v. Devan Nair (Straits Times Press (1975) Ltd & Anor, Third Parties [1993] 1 SLR 723* ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 16 rr. 1, 6, O. 18 r. 19

C *For the 3rd parties - R Tharmy; M/s Shook Lin & Bok*
For the defendants - Victoria Martin; M/s Victoria Martin Chambers & Sree

Reported by Baizura Abd Razak

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JUDGEMENT

Mohd Zawawi Salleh J:

Introduction

E **[1]** This was an application by the third parties to set aside the third party notice dated 2 September 2011 ("the third party notice") issued by the defendants pursuant to O. 16 r. 4 and/or r. 6 of the Rules of the High Court 1980 (RHC).

F **[2]** After considering the submissions advanced by both parties, this court allowed the application with costs fixed at RM3,000.

[3] For a better appreciation of the application, regard must be had to the background of the case.

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Background Facts

[4] The background facts giving rise to this matter are undisputed and can be summarised as follows.

H **[5]** The defendants *via* this action was sued by the plaintiff for the outstanding selling price under the property sale agreement dated 4 May 1996 ("PSA") under Bai Bithaman Ajil Facility granted to them.

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[6] In their statement of defence dated 14 November 2011 (encl. 7), the defendants had alleged that, *inter alia*, their inability to pay the outstanding was due to the first named third party's ("Aseambankers (M) Bhd") breaches in contract, tort and as banker to Shencourt Sdn Bhd ("the company") in which the 1st defendant was a Managing Director and to the project undertaken by the company known as the Galaxy Ampang Shopping Complex ("the project").

[7] The relationship between the 1st defendant, the company and the third parties, in fact, arose from a syndicated loan by Aseambankers (M) Bhd with the participation of the second, third and fourth named third parties to finance the project.

[8] By an action taken against Aseambankers (M) Bhd by the company (Case No. D2-22-665-2005) which was heard together with suit No: D2-22-443-2006, where the company and the 1st defendant were sued by the third parties ("the Civil Suit"), Zainun Ali, J (as she then was) was of the view that, *inter alia*, the financial catastrophe suffered by the company was a direct consequence of the third parties' unreasonable and unlawful act of refusing the drawdown of the facilities for the company's benefit in the project.

[9] The learned judge had then, *via* judgment dated 6 May 2009 ordered, *inter alia*, Aseambankers (M) Bhd to pay damages for the loss suffered by the 1st defendant as a result of the sale of his movable and immovable properties to raise funds for the project.

[10] Based on the judgment, the defendants had alleged that the third parties are liable to indemnify them for any payment ordered by this court because, according to them, the 1st defendant could not continue with the repayments to the plaintiff because he had to utilise his personal assets to finance and complete the project.

[11] On that basis, the third party notice was filed and issued by the defendants against the third parties. The third party notice is in the following terms:

> Ambil perhatian bahawa tindakan ini telah dimulakan oleh plaintif terhadap defendan. Di dalamnya, plaintif menuntut daripada defendan-defendan pembayaran balik kemudahan menurut prinsip syaria Al Bai Bithaman Ajil dan melalui satu gadaian bertarikh 8 Mei 1996 untuk sejumlah RM2,300,313.60 yang mana hanya

A sejumlah RM712,367.70 adalah tertunggak setakat 29 Julai 2011 bersama dengan faedah pada kadar 8% setahun sepertimana yang terdapat dalam writ saman yang mana sesalinannya disampaikan bersama-sama ini (disertakan sesalinan writ saman dan penyata tuntutan bertarikh 2 Ogos 2011.

B Defendan menuntut daripada kamu: jumlah sebanyak RM712,367.70 bersama dengan faedah pada kadar 8% setahun dan kos tindakan ini berdasarkan alasan-alasan berikut:

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C (i) kegagalan mengurniakan tanggungjawab mereka di bawah kemudahan kewangan;

(ii) memaksa defendan pertama untuk mengambil tindakan-tindakan cemas yang mengakibatkan kerugian kewangan peribadi terhadapnya; dan

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(iii) memaksa defendan pertama untuk menghentikan tanggung jawabnya yang lain untuk menyiapkan projek tersebut

[12] Dissatisfied with the action taken, the third parties filed the E present application.

Arguments By The Parties

[13] Learned counsel for the third parties had advanced three (3) main arguments in support of the application to set aside:

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(a) the third party notice is pre mature because there is a valid and effective order dated 24 June 2009 for stay of execution and enforcement of the judgment;

G (b) there was no reasonable cause of action against them because the defendants' claim in the civil suit was not related with the plaintiff's claim herein. The plaintiff's claim is for the repayment of the outstanding selling price under PSA while the defendant's claim against the third parties is for damages for the 1st defendant's alleged loss in respect of the project; and

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(c) the project was completed in 2004 and the 1st defendant had averred that the last payment made by him to the plaintiff was 22 March 2011. This clearly shows that the project had not given any impact to the defendants to fulfil their obligation to I the plaintiff.

[14] In resisting the application, learned counsel for the defendants argued that the 1st defendant had been personally put to loss as a result of the actions of Aseambankers (M) Bhd. Therefore, it was not opened for the third parties to say that there was no nexus that would be denying a valid judgment against them. It was further argued that even if the court orders the third parties to make payment of the claimed sum in this action, they need not have to be assessed in the civil suit.

Findings Of The Court

[15] The law on the third party proceeding is enunciated in O. 16 of RHC.

[16] According to r. 1 of O. 16 of RHC, a defendant may issue a third party notice either in form 22 (which is for claiming contribution or indemnity or other relief for remedy) or form 23 (where question or issue to be determined) if in any action the defendant:

(a) claims against a person not already a party to the action any contribution or indemnity; or

(b) claims against such a person any relief or remedy relating to or connected with the original subject matter of the action and substantially the same as some relief or remedy claimed by the plaintiff; or

(c) requires that any question or issue relating to or connected with the original subject matter of the action should be determined not only as between the plaintiff and the defendant but also as between either or both of them and a person not already a party to the action.

[17] In *Barclays Bank v. Tom* [1923] 1 KB 221, Scrutton LJ had this to say:

> [N]ow I think it is important to keep clearly in mind what the third party procedure is. A plaintiff has a claim against a defendant. The defendant thinks if he is liable he has a claim over against a third party. With that matter between the defendant and the third party the plaintiff has obviously nothing to do. He is not concerned with the question whether the defendant has a remedy against somebody else. His remedy is against the defendant. But

A the defendant is much interested in getting the third party bound by the result of the trial between the plaintiffs and himself, for otherwise he might be at a great disadvantage if, having fought the case against the plaintiffs and lost, he had then to fight the case against the third party possibly on different materials, with the risk that a different result might be arrived at. The object of the third party procedure is then in the first place to get the third party bound by the decision between the plaintiffs and the defendant.

[18] However, the third party notice issued by the defendants can be set aside upon an application by the third party pursuant to O. 16 r. 6 of RHC and it was held in *Lee Kuan Yew v. Devan Nair (Straits Times Press (1975) Ltd & Anor, Third Parties* [1993] 1 SLR 723 that the principles applicable to the application are the same as those governing the determination of an application to strike out the plaintiff's claim under O. 18 r. 19 of RHC or inherent jurisdiction of the court.

[19] For that, this court is mindful to the principles which are well settled while exercising its power under any of the four limbs of the provisions in determining this present application (see *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7).

[20] Bearing in mind the principles I have referred to and having perused the cause papers, I am not agreeable with the submissions advanced by learned counsel for the defendants.

[21] Chao Hick Tin JA in *CIMB Bank Bhd v. Dresdner Kleinwort Ltd* [2008] 4 SLR 543 had this to say:

> [t]he real test to determine whether a third-party action should be heard together with the main action is not that of connection alone but whether they are inextricably linked and the third-party action is an integral and inseparable part of the main action.

[22] In this case, the defendants had relied heavily on the judgment by Zainun Ali, J (as she then was) in the civil suit to establish the contribution/indemnity claim against the third parties.

[23] However, the distinction should be made between the plaintiff's claim herein and the one against the first third party in the civil suit. The claim against the defendants in this case arose from the breach on the part the defendants to pay the

outstanding selling price under PSA in respect of the property known as no. 7, Jalan S/13 I, Seksyen 5, 47000 Petaling Jaya, Selangor Darul Ehsan erected on a land identified as Grant No: PN 6531, Lot No: 506, Seksyen 5, Bandar Petaling Jaya, District of Petaling, Selangor Darul Ehsan ("the property"), while the one in the civil suit emerged from the breach of a syndicated loan by the 1st 3rd party in respect of the project undertaken by Shencourt Sdn Bhd where the 1st defendant was a Managing Director. They are poles apart be like chalk and cheese.

[24] Although in the civil suit, Zainun Ali, J had clearly ordered that Aseambankers (M) Bhd to pay the loss suffered by the 1st defendant as a result of the sale of his movable and immovable properties to raise funds for the project remaining due, there is no proof in this present case that the property in this case is subjected to the sale so ordered or the state of vulnerability of the defendants to pay the plaintiff had been taken into consideration before such order was made. Therefore, I am unable to see how the third party action is inextricably linked to and integral and inseparable part of the present action.

[25] Furthermore, it is my considered view that the third party notice which is totally dependent on the judgment in the civil suit, is pre mature because it had been stayed pending an appeal to the Court of Appeal.

[26] On that premise, the defendant's objection to this application does not hold water.

[27] It should be noted that a third party proceeding is to avoid multiplicity of proceedings on the same point with possibly differing conclusions, to save time and expense, and to avoid going the same facts again in order to bind the third party to a decision in favour of the plaintiff against the defendant (see *Barclays Bank v. Tom*). But in the present case, it is my plain view that the third parties are no way concerned with the argument between the plaintiff and the defendants because there is no substantially connection between the cases. Even if the civil suit judgment is sustained by the Court of Appeal, the 1st defendant still have opportunity to argue before the learned senior assistant registrar whether the judgment in this case falls within the judgment given

A by Zainun Ali J (as she then was) during the assessment of damages as it is the best corum to determine the issue and not this court.

Conclusion

B **[28]** In the light of the above, I allowed the third parties' application with costs fixed at RM3,000

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